SEP 23

MICHAEL RODAK,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-327

DENNIS HART,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Claims

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To the United States Court of Claims

Petitioner, Dennis Hart, petitions for a writ of certiorari to review the decision of the United States Court of Claims entered in this case on June 28, 1974.

OPINIONS BELOW

The opinion of the Court of Claims, printed in Addendum I attached hereto, is not yet officially reported. The case was presented to the Court of Claims as an appeal from a decision of the Civil Service Commission Board of Appeals and Review (B.A.R.) entered on September 11, 1972. The B.A.R. decision,

printed in Addendum II attached hereto, is not officially reported. The B.A.R. decision affirmed a decision dated April 25, 1972, of the Chicago Region, Civil Service Commission (C.S.C.). The C.S.C. decision, printed as Addendum III attached hereto, is not officially reported. The C.S.C. decision upheld a personnel action, effective February 5, 1970, of the Internal Revenue Service of the Treasury Department (I.R.S.) removing Petitioner from his employment with the Service. The I.R.S. decision, contained in a letter dated February 2, 1970, is printed as Addendum IV attached hereto, and is not officially reported.

JURISDICTION

The order of the Court of Claims was on June 28, 1974 (Addendum I). The jurisdiction of this court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims improperly found sufficiently specific the single Charge alleging Petitioner's *conspiracy* to *solicit and accept a bribe*, and also *accepting of a bribe*, and improperly found that the evidence offered at the Civil Service Commission appeal hearing did not differ in great degree from those facts supporting the original removal, for the reason that there was no evidence whatsoever as to any facts upon which petitioner's original removal was based.

2. Whether the Board of Appeals and Review and the Court of Claims improperly concluded that only harmless error was committed as the result of the regional Civil Service Commission's adverse decision being based upon evidence (Appendix C pages 7-11) that was specifically rejected by the trial Hear-

ing Officer, which was de hors the record before the C.S.C., and which directly denied the petitioner's right of confrontation, reply, rebuttal and cross-examination of the said excluded evidence.

3. Whether the Court of Claims improperly found no error in the procedures surrounding the admission into evidence, at the Civil Service Commission hearing, of a six-volume criminal trial transcript and the subsequent reliance upon the transcript by the official reviewing the removal decision, despite the fact that there was no advance notice to petitioner that the 6 volumes would be offered in lieu of witnesses at petitioner's C.S.C. hearing, and despite the fact that petitioner was never provided a copy of the 6 volume exhibit, either before, during or after the said C.S.C. hearing. Subsidiary to this question is the fact that the 6 volume exhibit contained many hundreds of pages of irrelevant matter, and that it contained the testimony of the Government's principal witness, who was not produced as a witness and was *not* available at petitioner's hearing for confrontation and cross-examination.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Since the provisions involved are lengthy, they are merely cited here, and the pertinent texts are to be set forth in Appendix A hereto.

Constitutional Provisions:

U.S. Const. amend V

U.S. Const. amend VI

Statutes:

5 *U.S.C.* § 7511 (1966)

5 *U.S.C.* § 7512 (1966)

28 *U.S.C.* § 1255(1) (1948)

28 *U.S.C.* § 1491 (1948)

Regulations:

5 *C.F.R.* § 752.202(a)(2) (1970)

STATEMENT OF THE CASE

Petitioner is a preference eligible employee under 5 *U.S.C.* § 7511 (1966), and was employed as a Criminal Investigator with the Alcohol, Tobacco, and Firearms Division of the Internal Revenue Service (I.R.S.). By a notice of proposed adverse action, dated December 30, 1969, and printed as Addendum VI hereto, Petitioner was informed by I.R.S. Assistant Regional commissioner, W. A. Collawn, that it was proposed to remove

Petitioner from the Service or otherwise discipline him, based on the charge and specification that on or about December 26, 1969, at Goldsboro, N.C., he conspired to solicit and accept a bribe, *and did accept a bribe*.

By a letter dated January 7, 1970, printed as Addendum V hereto Petitioner was informed that the charge was sustained and that he was *suspended* from duty and pay for a period of thirty (30) days, until February 5, 1970. Petitioner requested reconsideration in a telegram dated January 20, 1970.

By letter dated February 2, 1970, printed as Addendum IV hereto Mr. W. A. Collawn informed Petitioner that the charge was sustained and he was *removed* from the Service effective February 5, 1970. By letter dated February 18, 1970, printed as Addendum V hereto Petitioner was informed that the *suspension* decision was affirmed.

By letter dated March 4, 1970, printed as Appendix B hereto Petitioner appealed the removal action to the C.S.C. A hearing on this appeal was requested and scheduled, but the date of the hearing was postponed several times at the request of the Government. The hearing was held in St. Louis, Missouri, on January 17, 1972, before hearing officer Kirby Smith, Jr. The transcript (Hearing Record) of this hearing is printed at Appendix C., p. 6. At the hearing, testimony was received from Petitioner, I.R.S. agent Virgil Kruse, and Bureau of Narcotics and Dangerous Drugs (B.N.D.D.) Inspector John Thompson. Exhibits offered and accepted on behalf of Petitioner were: (i) a copy of the results of a polygraph test given to Leslie Atkinson, the man from whom Petitioner allegedly conspired to solicit and accept the bribe; (ii) an evidentiary order from a federal court in the Eastern District of New York; and (iii) a Justice Department Motion for dismissal of criminal charges pending against Petitioner. These exhibits are printed as Appendices D, E, and F, hereto.

The evidence offered by the I.R.S. at the hearing was: (1) a six-page report co-authored by Inspector Thompson (excluded upon objection), printed in Addendum III hereto; (A-28 to A-31) and (2) a report by alleged B.N.D.D. Inspector Yates (admitted over objection), printed in Addendum III hereto A-31 to A-35. (3) There was also an offer of a six-volume transcript of a New York criminal trial which was never designated a Hearing Exhibit, which was "conditionally" received by the hearing officer. This criminal trial transcript is *not* presented as Petitioner's exhibit for the reason that Petitioner has never been furnished a copy thereof by the Government.

In a decision by J. A. Connors, Chicago Region, C.S.C., dated April 25, 1972 (Addendum III), the removal decision was sustained. An appeal was taken to the B.A.R. There, in a decision dated September 11, 1972 (Addendum II), the decision was affirmed.

Petitioner filed his petition in the United States Court of Claims on February 28, 1973, asserting federal jurisdiction under 28 *U.S.C.* § 1491 (1948). Upon the briefs and oral argument of counsel, the Court of Claims on June 28, 1974, entered its order denying Petitioner's motion for summary judgment and granting defendant's cross motion for summary judgment Addendum I attached hereto.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the entire administrative procedure by which he was removed, beginning with the initial instigation of the charge and continuing through the C.S.C. hearing and decision and the B.A.R. decision, has so far departed from the accepted and usual course of proper administrative proceedings as to call for an exercise of this court's power of supervision. On its face, the record below shows that the proceedings were not in substantial compliance with constitutional, statutory and regulatory requirements; that the removal of Petitioner by the agency was arbitrary and capricious action; and the removal decision is not supported by substantial evidence. The action of the Court of Claims has so far sanctioned this departure from the accepted and usual course of administrative proceedings as to call for an exercise of this court's power of supervision.

One or two, or even several minor technical evidentiary deficiencies might not, standing alone, amount to a denial of due process; but that is not what is involved in this case. Here there is a record of heavy-handed practices administered with cavalier disregard for even the semblance of accepted standards of fair play or legality. The totality of this record discloses a callousness on the part of the agency officialdom as applied to Petitioner. This record in its entirety is so replete with shocking irregularities and is so permeated with the lack of even any pretense at fundamental fairness as urgently to require review of this court.

From the time of the original confusion concerning the suspension and removal, this record shows a deplorable insensitivity to even the most rudimentary standards of justice, and it is perhaps a sad commentary on the administrative appellate process that Petitioner has been forced to petition this Court for redress of the denial of his procedural protections.

The following particulars clearly show that action by this court is required to prevent deprivation of Petitioner's rights:

1. Petitioner is charged with 1) having *conspired* on 12-26-69 with Richard Patch at Goldsboro, N. C. to accept a bribe; and 2) *accepting* a bribe from Leslie Atkinson.

There is no evidence whatsoever of when, at what specific place, nor of what specific acts were "conspired" to accomplish; nor is there any evidence of any specific *overt act* perpetrated in furtherance of an alleged conspiracy. The charge in this respect is so vague and general as to be impossible of rebuttal, reply denial or mitigation.

There is no evidence or fact alleged which could be held to constitute *acceptance* of a bribe by petitioner or his alleged co-conspirator. The charge of *acceptance of a bribe*, being supported by no alleged acts, is so vague and general as to be impossible of rebuttal, reply to denial or mitigate. This lack of specificity also constitutes a denial of Petitioner's rights under 5 *U.S.C.* § 7512 (1966), to a statement of "any and all reasons, specifically and in detail, for the proposed [adverse] action." Petitioner was also denied his right under 5 *C.F.R.* § 752.202(a)(2) (1970), to review the material upon which the notice of proposed adverse action was based.

Additionally, some evidence produced at the C.S.C. appeal hearing and relied upon in the C.S.C. decision, necessarily differed from the evidence, if any, upon which his original removal was based. This is true because the hearing officer at the C.S.C. appeal hearing allowed the admission of evidence, i.e. 6 volume transcript which related to a criminal trial which had occurred prior to the hearing but *subsequent* to the removal decision. The allegations contained in the criminal indictment were not identical to the charge in the notice of proposed adverse action, so Petitioner's opportunity to defend was impaired.

Because Petitioner's removal was founded on a charge which lacked specificity and because it was "based on reasons not contained in the charge originally served on him, but on reasons he never had a chance of rebutting," this case comes within the scope of the principle enunciated in *Urbina v. United States*, 180 Ct. Cl. 194 (1967), and the removal should be held defective.

2. At the C.S.C. appeal hearing, the Government attempted to introduce an exhibit—a six-page report co-authored by Inspector Thompson (Addendum III pp. A-23 to A-31)—but was prevented from doing so by the hearing officer's ruling which excluded the evidence. App. C, *infra*. The written C.S.C. decision (Addendum III, pp. A-23 to A-31) nevertheless *quotes the excluded exhibit verbatim*, thus showing that the excluded exhibit was relied upon in making the decision on the appeal. The subsequent B.A.R. decision stated that this was only "harmless error" for the *reason* that Mr. Thompson's testimony at the C.S.C. hearing *substantially recounted* the statements contained in the excluded exhibit (Addendum II, pp. A-5 to A-7). The Court of Claims agreed that only harmless error was involved (Addendum I, pp. A-2, A-3).

However, even a cursory examination of Thompson's testimony at the C.S.C. hearing of 1-17-70 and a comparison of this testimony with the flagrantly improper, hearsay 6-page "statement" ruled improper and excluded at the trial of petitioners C.S.C. hearing, clearly shows this *reason* for declaring the error to be "harmless" to be wrong and utterly groundless.

The actual testimony of Inspector Thompson at the January 17, 1972 C.S.C. hearing dealt *solely* with non-incriminating occurrences *on and after the date of petitioner's arrest* at Goldsboro, N. C. on December 26, 1969. This testimony is to be found at pp. 11 through 31 of the transcript of petitioner's C.S.C. hearing. (Appendix C)

The 6-page statement, which was properly excluded at the Jan. 17, 1972 C.S.C. hearing by the presiding hearing officer, dealt with and recounted hearsay of the most virulent and unattributed sort dealing *solely* with occurrences alleged to have taken place *prior to petitioner's arrest* at Goldsboro, N. C. on December 26, 1969.

It is absolutely inconceivable that the B.A.R., as attorneys, would adopt a position that the 6-page excluded statement dealing with two years of alleged improper conduct *prior* to arrest, was "substantially recounted" in Inspector Thompson's testimony dealt solely with the arrest and matters occurring thereafter. It is both inconceivable and frightening that the United States Court of Claims has adopted and condoned such a ruthless infringement and denial of the rights of this petitioner, and of future civil service petitioners so abused.

The very basic impropriety which the Court of Claims and the B.A.R. overlooked, or chose to ignore, is petitioner's absolute *right* to reply to and rebut evidence offered and *admitted* against him at his C.S.C. hearing. The thoroughly and patently inadmissible 6-page statement was objected to at the hearing and was *not admitted*, it was twice specifically *excluded*. Hence, petitioner was not confronted with it, and as a result had no occasion or opportunity to reply or rebut it's scurrilous content. At the time that the authors of the C.S.C. decision in Chicago saw fit to adopt and include verbatim this *excluded* evidence in their decision ( ) petitioner could not reply or rebut for the obvious reason that the star-chamber adoption of the excluded evidence was not made known to him until the affirmance of the removal decision.

3. At the C.S.C. hearing, the Government attempted to introduce into evidence a six-volume transcript, containing more than one-thousand pages, of a criminal trial relating to the Petitioner. Upon objection, the hearing officer conditionally re-

ceived the material, subject to a subsequent ruling on its relevancy and materiality. App. C, *infra*, p. 6. Such a subsequent ruling was *never* made, with the result that the transcript was never officially received as evidence, and its contents should not have been considered.

The action of the Hearing Officer in receiving the 6 volume, 1000 page, transcript of testimony from a previously mistried criminal case ". . . subject to a subsequent ruling concerning its relevancy and materiality in the appraisal of this particular administrative action" (App. C, p. 6) is error so flagrant and original that petitioner cannot find precedent condemning it. The "subsequent ruling" was *not made at petitioner's January 17, 1972 hearing* so obviously the petitioner was not afforded confrontation with *admitted* evidence. He had no opportunity to reply, rebut, mitigate or specifically make objection to specific parts of this "evidence" made known to him for the first time on the morning of his C.S.C. hearing of Jan. 17, 1972.

If this 6-volume mass of "evidence" was in fact admissible for any purpose, which petitioner earnestly contests, it was admissible at the time of the January 17, 1972, Hearing. *Had* the Hearing Officer, rightfully or wrongfully, made a ruling at that time of admissibility, at least petitioner would have had an opportunity to *read* the 6 volumes and to make reply, rebuttal and specific objection to the testimony therein.

The Civil Service Commission appellate machinery came up with a frighteningly simple and unique method of depriving petitioner of his basic right to confront, reply, rebut or make specific objection to the awesome array of witness testimony, exhibits, stipulations and prejudicial, irrelevant and immaterial content of 6 volumes of testimony. The St. Louis official, acting as Hearing Officer, fails or refuses to rule as to admissibility at time of trial, the Chicago official, acting as decision-maker, allows the full 6 volumes into evidence without any further

notice to petitioner, except his final decision that petitioner is fired from his career position on the basis of this 6 volumes that was never shown to him.

If the transcript is to be considered as evidence, it is apparent that the Petitioner was denied his Sixth Amendment right of confrontation and cross-examination of those witnesses at the criminal trial whose testimony is purported to be adverse to Petitioner. Any such purported testimony relates to the issues raised by the criminal indictments, subsequently dismissed on Justice Department motion, and covers different areas than those related to the single agency charge.

Petitioner's rights have been abused in a particularly violent manner in relation to the chief Government witness against Petitioner at the criminal trial, Mr. Leslie Atkinson. At the time Atkinson testified and was cross-examined and confronted at the criminal trial nine months prior to the C.S.C. adverse decision the Government knew, but did not disclose to the Court or to defense counsel, that Atkinson had failed a Government administered polygraph (lie-detector) test in relation to portions of his testimony adverse to Petitioner. App. D. Once this fact was revealed, the criminal charges against Petitioner were dropped. App F.

The failure of the Government to provide Petitioner with a copy of the transcript also violated his right under 5 *C.F.R.* § 752.202(a)(1), 752.202(a)(2) to review the material relied on to support the removal. The Court of Claims failed to comment or rule on the question of the retrospective application of 5 *C.F.R.* § 752.202(a)(1) and 752.202(a)(2), although the applicability of these sections was briefed and argued by plaintiff and defendant in that Court. Similarly, the failure of the C.S.C. to advise Petitioner of the evidence it intended to use against him, and particularly the failure to furnish him with a copy thereof has been condemned in *Kutcher v. Higley*, 235 F.2d

505 (D.C. Cir. 1956), and *Mulligan v. Andrews*, 211 F.2d 28 (D.C. Cir. 1954.

If the transcript was not properly admitted into evidence, it should not have been considered in the C.S.C. decision and reliance on it constitutes reversible error. Similarly, if it was admitted into evidence, the procedural method by which it was unqualifiedly received also constitutes reversible error since it was relied upon in the C.S.C. decision. The U. S. Court of Claims condemned, in the case of *Ricucci v. U. S.*, 192 Ct. Cl. 1, an attempted use of documentary "evidence" very similar to that encountered herein, reversing, and calling the procedure "error of the greatest magnitude."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

WILLIAM B. KELLEHER
Attorney for Petitioner

September, 1974.

Certificate of Service

I hereby certify that on the 20th day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed to the Solicitor General, Department of Justice, Washington, D. C. 20530.

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